

SMITH & LOWNEY, P.L.L.C.

2317 EAST JOHN STREET
SEATTLE, WASHINGTON 98112
(206) 860-2883, FAX (206) 860-4187

December 21, 2015

RECEIVED ON:

Via Certified Mail - Return Receipt Requested

John Lovick, County Executive
Snohomish County
3000 Rockefeller Avenue, M/S407
Everett, WA 98201

DEC 28 2015
ORC
EPA Region 10
Office of the Regional Administrator

Re: NOTICE OF INTENT TO FILE SUIT UNDER THE CLEAN WATER ACT

Dear Executive Lovick:

We represent Waste Action Project, P.O. Box 4832, Seattle, WA 98104, (206) 849-5927, and Sno-King Watershed Council ("SKWC"), c/o William Lider, 2526 - 205th Place SW, Lynnwood, WA 98036, (425) 776-0671. Any response or correspondence related to this matter should be directed to us at the letterhead address, or to our co-counsel, Pamela S. Van Swearingen, 18229 84th Place W., Edmonds, WA 98026, (425) 672-2968. This letter is to provide you with sixty days' notice of Waste Action Project's and SKWC's intent to file a citizen suit against Snohomish County for violations of Snohomish County's National Pollutant Discharge Elimination System ("NPDES") permit for discharges from the County's municipal separate storm sewer system under Section 505 of the Clean Water Act ("CWA"), 33 USC § 1365.

Discharges from the County's municipal separate storm sewer system are regulated under the Phase I Municipal Stormwater Permit, issued by the Department of Ecology ("Ecology") on August 1, 2012, effective August 1, 2013, and the County's permit number is WAR044502 (the "2013 Permit"). Before August 1, 2013, these discharges of the County were regulated under the previous Phase I Municipal Stormwater Permit, issued by Ecology on August 1, 2012, effective September 1, 2012 (the "2012 Permit"). In this letter, these two permits are collectively called the "Phase I Permits." The County is in ongoing violation of the Phase I Permits as described below.

The allegations in this notice of intent to sue concern two adjacent sites located at 2600 100th Street SW, Everett, WA 98204 on the south side of 100th St. SW, between Airport Road to the west and 23rd Ave. W. to the east. The first site, called "Site 1" herein, comprises approximately seven acres within Tax Parcel No.'s 28042300201900 and 28042300202100. Site 1 is a roughly square shape, and is immediately adjacent to, and east of the second site, called "Site 2" herein. Site 2 comprises approximately four acres within Tax Parcel No. 28042300201800, within a roughly rectangular shape. Both sites are owned by Snohomish County and front directly on 100th St. SW. The exact size of the Site 1 and Site 2 parking

areas is unknown as topographic survey and engineered drawings have never been prepared for either of the new or redeveloped parking areas.

Most recently Site 2 had been used for parking and contractor storage related to the County's 36-inch culvert installation project that was completed about July 2015 for expansion and/or improvement of the Paine Field/Snohomish County Airport ("Airport"), which is directly to the west across Airport Road. Sites 1 and 2 are located within drainage areas designated by the County as Sub-Basins SC-3 and SC-4 on the Airport's 2008 binding site plan. Precipitation and snow melt runoff from these sites discharge via County-owned drainage ditches on the north (along 100th St. SW) and south sides of Site 1 and newly constructed drainage ditch in Site 2 and via sheet flow and rivulets and other drainage features to a County-owned wetlands with minimum delineations of Category II and III, currently referred to by the County as Wetland ERR. In turn, this wetland discharges to the City of Everett's municipal separate storm sewer system ("MS4") and then into Swamp Creek, a tributary of the Sammamish River and Lake Washington. Drainage features on and adjacent to Sites 1 and 2 are part of the County's municipal separate storm sewer system ("MS4"), as defined by the Phase I Permits.

On July 28, 2008, the County obtained a demolition permit to demolish five buildings totaling approximately 25,740 square feet on Site 1. However, the Airport and/or other County agency allowed the demolition permit to expire without a final inspection or approval. The site was left unused until sometime in 2013. Between 2008 and 2013, Site 1 was left undeveloped and natural revegetation of the site began in this period during which Site 1 was mostly covered with an unpaved, uncompacted, pervious surface that allowed precipitation drainage to the ground as evidenced by vegetation visible in historic aerial photographs. Sometime between May 2013 and July 2014, on dates known to the County, the County constructed or allowed a tenant under its supervision to construct a parking lot on all or most of Site 1, including the installation of a pollution generating impervious surface of compacted crushed rock and gravel, fencing, and access on 100th St. SW. The County's redevelopment of Site 1 was performed without the flow control and stormwater treatment features required by County code and the stormwater management program adopted by the County under the Phase I Permits. Redevelopment of Site 1 included construction activities disturbing more than one acre, triggering a requirement for coverage of construction-period stormwater discharges under the Construction Stormwater General Permit ("CSGP") issued by Ecology. The County did not obtain coverage under the CSGP for the Site 1 redevelopment. In addition, the County failed to perform the environmental analysis required by the State Environmental Policy Act ("SEPA") or make a threshold determination. The County also failed to obtain a Land Disturbing Activity ("LDA") permit for the Site 1 redevelopment.

On or about August 1, 2014, Snohomish County approved a grading permit application PFN: 07-104017 000 00 SPA to Verizon Wireless to install a new 100' monopole cell phone tower located at the Southeast corner of Site 1. Grading work included 131 cubic yards of cut and 262 cubic yards of fill and addition of 7,109 square feet of new or replaced impervious surface. It is reported that this project encroached into wetland buffers on the site.

Under SCC 30.62A.320, standards and requirements for buffers and impervious surfaces, Table 2B, redevelopment within a 150 foot buffer between a high intensity use such as a parking lot and Category II wetland, such as Wetland ERR, is prohibited. Furthermore, SCC 30.63A.570(3), regarding Minimum requirement 8: Detention or treatment in wetlands and wetland buffers, states in part, "Stormwater treatment and flow control facilities shall not be built within a wetland buffer" On dates known to the County, it unlawfully constructed or allowed to be constructed the replaced pollution generating impervious surface of the Site 1 parking lot with untreated, un-detained stormwater runoff discharging into this buffer. *See* SCC 30.62A.320, SCC 30.62A.340(4)(b) and SCC 30.63A.570.

Between June 30, 2015, and October 28, 2015, on dates known to the County, the County constructed (or allowed construction of) a bus parking lot and/or park and ride lot on Site 2. Before the development of Site 2, it was partially in a vegetated state, designated as an unpaved contractor storage area with pervious surface. The development of Site 2 included the installation of an impervious surface of crushed rock and/or asphalt or similar surfacing material, as well as the installation of fencing around the site with a paved driveway entry on 100th St. SW. This development also extended into the Wetland ERR buffer zone (*see* SCC 30.62A.320 and SCC 30.62A.340(4)(b)), and was provided with no flow control or stormwater treatment features required by County code and the stormwater management program adopted by the County under the Phase I Permits. For the Site 2 development, the County failed to perform the requisite SEPA environmental analysis or to determine if coverage under the CSGP or an LDA permit was required.

In December 2015, the County removed crushed rock and other surfacing material from Site 2, or a portion thereof, constructed a new drainage ditch, and put down straw on the remaining surfaces, or a portion thereof. This work was also performed without engineered drawings, an LDA permit, or an approved Stormwater Pollution Prevention Plan ("SWPPP"). However, the Site 2 soil is reported to remain in a compacted impervious condition and the straw placed immediately upstream of the wetland may introduce noxious weed seeds to this wetland at the headwaters of Swamp Creek.

The County's development and/or redevelopment of Sites 1 and 2, and the current conditions at the sites, is in ongoing violation of the conditions by the installation of new or new and/or replaced pollution generating impervious surfaces under its Phase I Permits as discussed in this notice of intent to sue. Pollution generating bus and vehicle operations continue and remain in full operation at Site 1.

Condition S4 of the Phase I Permits addresses compliance with standards. S4.C of the Phase I Permits requires the County to reduce the discharge of pollutants to the maximum extent practicable ("MEP"). S4.D of the Phase I Permits further requires the County to use all known, available, and reasonable methods of prevention, control and treatment ("AKART") to prevent and control pollution of waters of the State of Washington. The County is in violation of these conditions because it has not implemented MEP or AKART for stormwater discharges from Sites 1 and 2. These sites were redeveloped and developed without implementation of required best management practices, including flow control and water

quality treatment, which are required here for MEP and AKART. In addition, extension of the impervious features of these sites into the Wetland ERR buffer is inconsistent with MEP and AKART. As a result of these failures, a greater amount of pollution, including suspended solids, turbidity, nutrients, dirt, oil and grease, and metals, including copper and zinc, is discharged to Wetland ERR and downstream waters than would be if MEP and AKART were applied.


Conditions S5.A of the Phase I Permits require the County to implement a Stormwater Management Program ("SWMP"), as specified. S5.B of the Phase I Permits requires that the SWMP "be designed to reduce the discharge of pollutants from MS4s to the MEP, meet state AKART requirements, and protect water quality." By failing to implement flow control and water quality treatment for Sites 1 and 2, and by allowing the impervious surfaces of Sites 1 and 2 to intrude into the Wetland ERR buffer, the County is in violation of these conditions because it has not implemented a SWMP that reduces pollutant discharges to the MEP, meets AKART requirements, or protects water quality.

Conditions S5.C of the Phase I Permits specify requisite components of the SWMP, and clarify that the SWMP requirements apply to MS4s and areas served by MS4s owned or operated by the County. S5.C.3 of the Phase I Permits requires the SWMP to include coordination mechanisms among departments within the County to eliminate barriers to compliance with the terms of the permits. The County is in violation of S5.C.3 of the Phase I Permits because its SWMP does not include adequate coordination mechanisms among the County's departments to eliminate barriers to compliance; it has failed to implement such mechanisms with regard to development, redevelopment, or current conditions at Sites 1 and 2, which are owned and operated by the County.

Conditions S5.C.5 of the Phase I Permits require that the SWMP include a program to prevent and control the impacts of runoff from new development, redevelopment, and construction activities that applies to both private and public development. Under these permit conditions, this sub-program must include: a site planning process (or requirements); best management practice selection; and, design criteria adequate to implement specified Minimum Requirements, thresholds, and definitions, as specified by Ecology. This must include a process of permits, plan review, and inspections to ensure that runoff control for new development, redevelopment, and construction activities meets the substantive requirements of the SWMP. The County is in violation of these conditions because its S5.C.5 sub-program is inadequate or was not implemented with regard to development, redevelopment, or current conditions at Sites 1 and 2. The County constructed its facilities at Sites 1 and 2 without the requisite CGSP or LDA permit coverages which was acknowledged by Bill Dolan, Deputy Airport Director, in a December 7, 2015 letter to Mike McCrary. These violations were also acknowledged by Bill Lief, Environmental Programs Compliance Specialist, Snohomish County Surface Water Management in a December 14, 2015 e-mail to Rachael McCrear at Department of Ecology stating, "Snohomish County has reviewed the activities at the 100th St SW site and has concluded that a violation of the NPDES municipal stormwater permit has occurred."

Very truly yours,

SMITH & LOWNEY, P.L.L.C.

By: 
Richard A. Smith

c: Gina McCarthy, Administrator, U.S. EPA
Dennis McLerran, Administrator, Region 10 U.S. EPA
Maia Bellon, Director, Washington Department of Ecology

Condition S5.C.9.b.viii of the 2012 Permit requires that the County implement policies and practices to reduce pollutants in discharges from lands owned or maintained by the County. Such policies and practices must address sediment and erosion control, among other requirements. Condition S5.C.9.e of the 2013 Permit requires the same. The County is in violation of these conditions because it has not implemented policies and practices to control sediment and erosion or otherwise reduce pollutants from Sites 1 and 2.

The above-described ongoing violations reflect information that is currently available to Waste Action Project and SKWC. These violations are ongoing. Waste Action Project and SKWC intend to sue for all violations, including those yet to be uncovered and those committed subsequent to the date of this notice of intent to sue.

Condition G20 of the 2013 Permit requires the County to provide written notification of failures to comply with permit terms and conditions within 30 days of becoming aware of the non-compliance. The notification is to describe the non-compliance, provide non-compliance beginning and ending dates and an anticipated date of correction if appropriate, and steps taken or planned to reduce, eliminate, or prevent reoccurrence of the non-compliance. G20.B also requires the County to take appropriate action to stop or correct the condition of non-compliance. The County is in violation of these requirements because it has failed to provide the requisite written notice to Ecology within 30 days of the non-compliance described in this notice of intent to sue, and because it has not taken appropriate action to stop or correct the conditions of non-compliance.

Section 309(d) of the CWA, 33 USC § 1319(d) provides for penalties of up to \$37,500 per violation per day. *See* 40 C.F.R. § 19.4; 73 Fed. Reg. 75340-75346 (Dec. 11, 2008). In addition to civil penalties, Waste Action Project will seek injunctive relief to prevent further violations under Sections 505(a) and (d) of the CWA, 33 USC § 1365(a) and (d), and such other relief as is permitted by law. Also, Section 505(d) of the CWA, 33 USC § 1365(d), permits prevailing parties to recover costs including attorney's fees.

Waste Action Project and SKWC believe that this NOTICE OF INTENT TO SUE sufficiently states grounds for filing suit. We intend, at the close of the 60-day notice period, or shortly thereafter, to file a citizen suit against Snohomish County under Section 505(a) of the Clean Water Act for violations.

During the 60-day notice period, we would be willing to discuss effective remedies for the violations in this letter and settlement terms. If you wish to pursue such discussions in the absence of litigation, we suggest that you initiate those discussions within 10 days of receiving this notice so that a meeting can be arranged and so that negotiations may be completed before the end of the 60-day notice period. We do not intend to delay the filing of a complaint if discussions are continuing when the notice period ends.

In addition to meeting the 2 criteria for an extension of the attainment date, EPA approved Idaho's NAA new source review program for the 2006 PM_{2.5} NAAQS on December 27, 2010 (75 FR 72719). Idaho annually incorporates all federal rules for the nonattainment new source review program. The most recent approved update included all federal rules through July 1, 2013, except the vacated provisions (80 FR 18526). Idaho is currently implementing this program in the Logan UT/ID NAA. There are no existing major stationary sources in the NAA and DEQ has not received, nor expects, any applications for new major stationary sources.

In sum, Idaho believes an extension should be granted under Section 188(d) of the CAA as (1) the State has complied with all requirements and commitments pertaining to the area in the applicable implementation plans, and (2) preliminary data shows that both the 98th percentile and annual mean are below the PM_{2.5} NAAQS. DEQ and the citizens of Franklin County have worked very hard to implement control measures to lower PM_{2.5} levels and the air quality monitor demonstrates the control measures are working.

If you have any questions, please contact Tiffany Floyd, Air Quality Administrator at (208) 373-0502. For any questions of a legal nature, please contact Lisa Carlson, Deputy Attorney General at (208) 373-0494.

Sincerely,



John H. Tippetts
Director

c: Tiffany Floyd, DEQ Administrator, Air Quality
Bruce Olenick, DEQ Administrator, Pocatello Regional Office
Mary Anderson, DEQ Manager, Mobile and Area source Program
Lisa Carlson, Deputy Attorney General
Jan Hastings, EPA Acting Director Air, Waste and Toxics

